

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL 10 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2012-0144-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
EDUARDO VALENZUELA,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR201000961

Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF GRANTED IN PART

James P. Walsh, Pinal County Attorney
By James L. Heard

Florence
Attorneys for Respondent

Harriette P. Levitt

Tucson
Attorney for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Eduardo Valenzuela seeks review of the trial court's order summarily denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Valenzuela pled guilty in 2010 to third-degree burglary, and the trial court suspended the imposition of sentence and placed Valenzuela on four years' probation. The court initially awarded restitution of \$7,297.41 to the victim and \$5,760.90 to the victim's insurance company. That award was vacated after the court granted relief on Valenzuela's first petition for post-conviction relief, and a contested restitution hearing was scheduled. Following that hearing, the court ordered that Valenzuela pay restitution for the property stolen in the burglary of \$6,936.00 to the victim and \$5,760.90 to the victim's insurance company.

¶3 Valenzuela filed a new petition for post-conviction relief arguing the trial court had been "presented with erroneous information regarding the value of restitution," claiming the victim's testimony did not support the restitution award and that his valuation of the stolen property, specifically of certain firearms and air rifles and pistols, was inaccurate in light of evidence that had not been presented at the restitution hearing. He also identified several purported calculation errors in the restitution award. Valenzuela further claimed his trial counsel had been ineffective for failing to present evidence contesting the victim's valuations instead of arguing that the insurance company's significantly lower valuations of the weapons should be adopted.

¶4 The trial court summarily denied relief, concluding that the victim's testimony was sufficient to support the restitution award and that the evidence Valenzuela had identified showed only that there could be differing opinions regarding the value of the stolen property, not that the victim's valuation was incorrect. The court also observed that Valenzuela's alternate valuations were not newly discovered evidence pursuant to

Rule 32.1(e). The court rejected Valenzuela's related claim of ineffective assistance of counsel, stating that the evidence Valenzuela claimed his attorney should have presented was not as reliable as the victim's testimony because the alternate valuations had been made without the weapons being examined. Thus, the court concluded, Valenzuela's counsel's decision to not present such evidence was tactical and did not fall below prevailing professional norms. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) ("To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant."); *State v. Meeker*, 143 Ariz. 256, 260, 693 P.2d 911, 915 (1984) ("Disagreements as to trial strategy . . . will not support a claim of ineffective assistance of counsel as long as the challenged conduct could have some reasoned basis.").

¶5 On review, Valenzuela repeats his claims that the trial court erred in relying on the victim's valuations and that his counsel had been ineffective in failing to present alternative valuations of the stolen weapons. We conclude the court thoroughly reviewed and correctly rejected his claim that the victim's valuations did not support the restitution award and his related claim of ineffective assistance of counsel. We therefore approve and adopt the court's ruling on those claims and see no reason to restate its reasoning here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). We write further only to address facets of Valenzuela's argument the court did not expressly address.

¶6 First, Valenzuela asserts, as he did below, that the restitution award improperly included \$500 for the deductible provided in the victim’s insurance policy, and that no evidence suggests the victim paid that deductible.¹ The state argued at the restitution hearing that the restitution award should include “not only [the victim’s] \$500 deductible,” but also the difference between the victim’s valuation of his property and the amount his insurance company had paid him. The trial court found that the value of the stolen property was \$12,196,² yet it appears it added \$500 to that amount in calculating restitution. We agree with Valenzuela that we can find no basis in the record for the court to have done so. No evidence suggests the victim paid a deductible to the insurance company or had reduced his own valuation of his property by that amount.

¶7 Valenzuela also claims the victim’s restitution award improperly included the value of two watches for which he had already been paid by his insurance company. This claim is unsupported by the record—the court clearly deducted from the victim’s restitution award the value of the watches that had been paid to him by the insurance

¹Although Valenzuela did not raise this issue at the restitution hearing, the state did not argue the claim is precluded pursuant to Rule 32.2(a)(3). Because Valenzuela clearly is entitled to relief, in our discretion, we decline to find the claim precluded. *See* Ariz. R. Crim. P. 32.2(c); *see also State v. Lewandowski*, 220 Ariz. 531, ¶ 4, 207 P.3d 784, 786 (App. 2009) (“[T]he imposition of an illegal sentence constitutes fundamental error.”); *State v. Fancher*, 169 Ariz. 266, 268, 818 P.2d 251, 253 (App. 1991) (“Restitution is part of the sentencing process.”).

²The trial court stated at the restitution hearing that the victim had “provided enough information and evidence to the Court that the firearms and airguns were worth \$12,196.” But that amount was derived from the exhibit the victim relied on in testifying at the restitution hearing, and that exhibit included the value of the watches in the \$12,196 sum. Because we can find no basis in the record to conclude the value of the firearms and airguns alone was \$12,196 without including the watches, we presume the court misspoke and intended that total to include the value of the watches.

company. Finally, Valenzuela asserts the restitution award was miscalculated and included an additional \$40 for which there was “no explanation.” Valenzuela did not raise this claim below, and we therefore do not address it.³ See Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review to contain issues “decided by the trial court . . . which the defendant wishes to present to the appellate court for review”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (petitioner may not present new issues in petition for review).

¶8 For the reasons stated, we grant review and grant relief on Valenzuela’s claim that the \$500 insurance deductible was incorrectly included in the restitution award. We remand the case to the trial court to correct the restitution award accordingly. We otherwise deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

³We observe, however, that the restitution minute entry lists an amount \$40 less than the trial court’s oral finding at the restitution hearing.